United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

62

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,206

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL F. HILLERY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT AND APPENDIX

Denis K. Lane
917 15th Street, N.W.
Washington, D.C. 20005
Attorney for Appellant

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED

1. The constitutional rights of an individual who had been told by a police officer that he was not under arrest but was questioned in the absence of counsel, then gave a sample of urine during an extended detention by the police were violated in such manner that the evidence obtained by the detention should have been suppressed.

2. Collateral estoppel applies against the prosecution when a person reporting an accident is interrogated and makes oral admissions substantial in character; gives a urine specimen when he has been lead to a false sense of security by an officer who emphasizes that he is not under arrest.

3. Expert testimony should not be received in evidence as to the amount of alcohol in a specimen and effect thereof upon a defendant when the alleged specimen was not received in evidence at the trial.

4. In a negligent homicide case where there is no testimony by opinion or directly of excessive speed by the accused or other demonstrable evidence showing negligence when requested, the Court should have charged that there is no inference of negligence from the happening of an accident.

This case has not been previously before this Court under the same or similar title.

REFERENCE TO RULINGS

Order Denying Motion to Suppress Evidence (Walsh, J.)

Opinion dated May 9, 1969 (Record, p. 10)

Ruling of Trial Court denying renewal of Motion to Suppress at trial and adoption of views of previous opinion (App. 1).

Rulings of Court of admissibility of scientific evidence:

1. Testimony as to specimen by chemist;
2. Testimony by pathologist.

Ruling as to Requested Instruction.

STATEMENT OF THE CASE

This is an appeal from a conviction of negligent homicide.

Appellant, Paul F. Hillery, was indicted for alleged manslaughter arising out of the operation of his automobile in the District of Columbia on the night of November 28, 1967. Hillery admitted driving his car at the time of the accident. A female passenger drowned as the car entered the Anacostia River. Hillery managed to swim to shore despite the exposure on a night that was described as cold and windy. Hillery had never driven in the vicinity of the accident before and the intersection from the testimony of one of the government witnesses was not lighted.

Testimony shows that Hillery, following his escape from the river, flagged down a car and asked to be taken to the nearest police station. He was driven by a passing motorist to the 11th Precinct and he then reported what had happened to the police. Testimony indicated that he was questioned at the police station and again at the Anacostia Parkway location of the accident and later at the police station. A urine sample was obtained at the hospital and a written statement was made at the police station at a later time.

Following the arraignment and plea of not guilty by Hillery, a motion to suppress the evidence was filed on his behalf and was heard by one of the judges of the court and denied. The opinion of the Court as to the motion appears in the record (p. 10).

Testimony of both sides showed that the following took place at the police station:

Hillery was told the following:

1. That he was not under arrest.
2. That he was under arrest.

3. That he could have a lawyer.
4. That he did not need a lawyer.

There was testimony at the Motion by defendant's wife, himself and the police. The motion pointed in particular to the matter of counsel not being present after accused had indicated his desire for one and requested specifically the suppression of the urine sample and all evidence which was obtained by means other than that which accorded Appellant his constitutional rights.

Denial of the Motion was rationalized by the Court on the grounds:

(a) That police officers knew of his drinking and doubted his story.

(b) That he had no right to counsel under the circumstances.

(c) That he voluntarily agreed to the tests.

No charge involving intoxication or felonious conduct had been placed against him at that time.

At the trial, the Motion to Suppress was renewed and denied by a second judge who adopted the factual and legal conclusions of the former.

Testimony at the trial showed that an automobile was recovered from the river. It was stipulated that it belonged to the defendant and that the car contained the body of one Catherine Petinga who it was later determined died from drowning. The government had no testimony of any eyewitnesses to the happening and no expert testimony as to speed or related matters. It offered testimony from the witness Gatesman as to apparent drinking on the part of the accused and expert testimony. Counsel objected to the introduction of this scientific testimony because the sample of urine allegedly

taken from Hillery was not produced in court. The Court permitted, however, the witness Vignau to testify that the sample taken had been analyzed in the Health Department laboratory and showed .29 alcohol by weight. (App. 3-4) Prior to its introduction, objection was made and after a motion to strike the testimony was made. Both objections were denied by the lower court.

Testimony by the defense concerned the lack of lighting by Officer Queen. (App. 4-5) The accused took the stand and told of driving along the very dark road and not seeing any warning signs drove to a grassy spot which fronted Good Hope Road. That when he saw what position he was in put on the brakes but was unable to stop his car. Thus the accident happened. (App. 5)

As to drinking accused stated that he had consumed four glasses of beer. Next in rebuttal an expert was called and again over the objection of defendant, expert testimony was given which concerned the urine sample. Its effect was it believed contra to that of defendant, pointing out that the level of alcohol (.29) was not indicative of the consumption of four beers.

Defendant submitted one prayer as to the inference of negligence from the happening of an accident. The Court denied the prayer and in the charge did not cover the elements contained in the proposed instruction. After argument and charge by the court, which was objected to because of the failure above pointed out, the case went to the jury which returned a verdict of negligent homicide against Hillery.

ARGUMENT

I

Where evidence is obtained by the police after a suspect has requested an attorney and none is obtained, it must be suppressed because in the absence of counsel to advise a suspect, the police must cease the questioning or obtaining evidence such as blood or urine specimens directly from such person in custody.

Testimony both at the motion to suppress and at the trial indicated (App. 1-2) that the accused wished to consult with counsel and because he was only a short time resident of the area was then unable to obtain one although recourse to the Neighborhood Legal Services was made (App. 1). It indicated as well that he was told that he was not under arrest (App. 2) before and by the officer who obtained the urine specimen.

The District of Columbia sobriety test statute gives a motor vehicle operator the right to refuse the test. *Stuart v. District of Columbia,* D.C. Mun. App. 1960, 157 A.2d 294.

One in this type of situation certainly needs (as well as has the Sixth Amendment right to) the assistance of counsel. The court below regarded the interrogation of Hillery and the obtaining of evidence from him as justified because the police knew he had been drinking and doubted his story.

Although the police had told him that he was not under arrest and free to go, he was not able to go and they knew it. They were processing him whether he believed it or not, just as if he were under arrest. Under these circumstances he has all the rights as defined in the *Miranda*[1] decision and the only alternative to the

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[1]*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1965).

presence of counsel is an injunction ot the police in such cases as this to make their investigation of persons and things independent of the suspect himself until he can be afforded an attorney. Without this direction from the courts, the right to counsel expressed in the Constitution is but a pious gesture.

II

Where evidence is obtained directly from an accused under circumstances which in toto show fundamental unfairness then the evidence should be suppressed under the theory of estoppel.

At the hearing on the Motion to Suppress there was before the court the theory of estoppel. It was rejected there and at the trial as well. The principle of fairness has been enunicated in the criminal law to apply to defendants. It should be applied here to the government. Hillery being in an accident was under the legal requirement to report the accident. He did this. He was under the legal requirement to attempt to aid the injured. He did this. To do this he must necesssarily report to the nearest police station which he did. From that moment on, without the assistance or advice of counsel, he was interrogated without knowing in truth, law or fact whether or not he was under arrest. Under these circumstances, can it be said that he voluntarily gave information, voluntarily gave a urine specimen which resulted in his charge of manslaughter.

The theory of estoppel is founded on the principle of that dignity and integrity which government should afford its citizens especially when the unusual has occurred and one presents himself to the police and is processed by the police in the no-man's land in which the appellant apparently found himself at the police station and the hospital in this case. See *Miranda v. Arizona, supra.*

III

No testimony founded upon the taking of a sample of blood or urine from an accused may be received when the alleged specimen is not produced in court and received in evidence.

At page 91 of the transcript (App. 3-4) there appears the attempt by the government through the use of a Health Department record to have received in evidence the report of urinalysis of an alleged specimen taken from the defendant. Objection was made that the specimen had not been produced. As the record thereafter shows, it was never produced in the trial of this case. This precise question has been before this court in the *Novak*[2] case and it was explained in *Wheeler.*[3]

In that case a police officer testified he obtained a specimen of the accused's urine in a bottle which he labeled with the accused's name and his own initials and delivered to the Health Department laboratory. A Health Department chemist then testified concerning his urinalysis of a specimen which had been withdrawn from a bottle produced in court and labeled with the accused's name. We held that the testimony was inadmissible on the ground that there was "missing a necessary link in the chain of identification" because the police officer was not asked to identify the bottle produced in court to establish that it was the same one which he delivered to the laboratory and from which the chemist's analyzed specimen was taken. The key fact which distinguishes *Novak* from this case is that the specimen there was not taken in the regular course of business of the laboratory involved. Instead, it was taken by an outside agency, the police, and only thereafter delivered to the laboratory.

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[2] *Novak v. District of Columbia,* 82 U.S. App. D.C. 95, 160 F.2d 588.

[3] *Wheeler v. United States,* 93 U.S.App.D.C. 259, 211 F.2d 19 (1953).

The expert testimony received despite the absence of the specimen can in no sense be considered "harmless error" in the light of all the testimony bearing on the condition of Hillery on the night in question.

IV

Under the circumstances of this case, the accused had the right to a charge to the jury which fairly would present the view that the death involved in the case had occurred by accidental means not involving culpable negligence on his part.

Since, after the conclusion of all the testimony in the case, there was no evidence of excessive speed or lack of control over the vehicle by Hillery and the factor of the poor visibility and lack of personal knowledge of the area in which he was driving the following instruction was proposed (App. 6):

> "No inference of negligence whatever arises from the mere happening of the accident in this case. You are not to infer from the mere fact that an accident happened that this defendant was negligent. On the contrary, the legal presumption is that reasonable care was exercised by him. The burden of proof is upon the government, charging negligence to overcome this presumption of due care by proof beyond a reasonable doubt, and to prove that the negligence, if established, was the proximate cause of the accident."

This has been expressed in a civil case, *Beit v. United States*, 260 F.2d 386 (5 Cir., 1958):

> "Unavoidable accident does not, as appellants seem to think, apply only where the injury is brought about by the intervention of outside forces—whether of God, nature or third persons. An accident which is caused

> by an absence of exceptional foresight, skill, or care which the law does not expect of the ordinarily prudent man is also characterized as inevitable or unavoidable."

The Court (App. 7) thought that this applies only to civil cases.

Thus was foreclosed the right to have an important hypothesis of his case presented to the jury.

CONCLUSION

It is respectfully urged that the constitutional rights of the defendant below were violated in the obtaining of evidence by the police and that in the reception of such evidence the court erred and that as a result of the failure of the court to charge the jury as to an important aspect of the case, that Appellant was denied the opportunity to make an effective presentation of his case to the jury; and that this Court should reverse the judgment of conviction of negligent homicide.

Respectfully submitted,

Dennis K. Lane
917 15th Street, N.W.
Washington, D.C. 20005
Attorney for Appellant

CONTENTS OF THE APPENDIX

APPENDIX

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

* * *

[32] (AT THE BENCH)

MR. LANE: If Your Honor please, at the outset I informed the Court about the motion to suppress which I had filed.

Now, the circumstances of the defendant's position is this: As the evidence has shown before Your Honor, he voluntarily went to No. 11 Precinct.

Now, while he was at No. 11 Precinct, he was asked if he wanted an attorney. He informed them that he did not want an attorney. There was no attorney provided. Apparently—

THE COURT: This has all been gone over with Judge Walsh, and he wrote a memorandum to which I concur.

[33] Your motion is denied again for the record.

* * *

[75] STIPULATED TESTIMONY OF THOMAS ABBOTT

He was also asked if he would like us to obtain counsel for him at that time.

At this time, he stated that he would like to have counsel, preferably his own, but he stated that his counsel was in Richmond.

I did explain that we did have Neighborhood Legal Services who could provide legal counsel for him at that [76] particular moment until the time he could procure his own counsel in his own behalf on his own incentive.

At this time, we tried to call the Neighborhood Legal Services, but no one was answering the phone. At that time they were not keeping a night number.

At that time, Mr. Hillery stated that he would obtain his own counsel and speak with his own counsel–

* * *

[81] Q. So, when you read the statement, "Your are under arrest," that would directly be contrary to what you had been telling him, right? A. In a technical sense, yes.

Q. Actually it would be in an actual sense, because you told us you had told him that he was not under arrest? A. At that particular time.

Q. And then you take a card out and say, "now, you are under arrest? A. That is what's written on the card.

Q. Now, can you explain that, how one minute you can say he is not under arrest and in another breath you say he is under. A. Yes, sir; it is self-explanatory.

We did advise him that if we did find evidence, that at that particular time he wasn't under arrest, but we didn't have him to make any statement that would be self-incriminating without him knowing his rights as to obtaining counsel or remaining silent.

Q. Did you explain to Mr. Hillery that under the District of Columbia Code that a person who is suspected of driving a vehicle under the influence of alcohol is not required to give that test? A. Yes, sir.

* * *

December 3, 1969

* * *

[88-A] JOHN A. VIGNAU

* * *

DIRECT EXAMINATION

BY MR. PHELPS:

* * *

[90] Q. Now, Mr. Vignau, I show you what has been marked for the purposes of identification as Government's Exhibit No. 3,

and ask you, sir, if you can identify that? A. (After examining), I can.

Q. What is it? A. It is a report of one of two forms accompany the specimen submitted by the United States Park Police.

MR. LANE: May we approach the bench?

THE COURT: Surely.

(AT THE BENCH)

MR. LANE: If Your Honor please, if the purpose is to introduce the record of the Health Department, Mr. Phelps has shown me the record, I am going to object to the record being introduced in evidence at this time.

[91] THE COURT: It has not been offered.

MR. LANE: No; but I think that is proper at this point, since he has identified it, to make it known before he goes further with the witness.

I assume that the witness can testify other than through this record. The record, I don't think, is admissible under its own—

THE COURT: What record are we talking about?

MR. PHELPS: The man's official laboratory report. On the back, if he would be allowed to explain, it is the laboratory report of the analysis performed on the urine.

THE COURT: It is his report?

MR. PHELPS: Yes, sir; written, typed in part, by the policeman. But the official lab report is on the back. In the bottom of it, he fills in conclusions.

So, he will testify as to the experiment he did with the urine.

THE COURT: In other words, the report form is furnished to him by the U.S. Park Police, is that correct?

MR. PHELPS: Yes, sir.

MR. LANE: May I make one more point: Do you have the specimen? Are you going to identify that?

MR. PHELPS: The Government will not introduce the specimen of urine. It is not available.

MR. LANE: I will object to it.

[92] THE COURT: Your objection is overruled.

* * *

[102] CHARLES A. QUEEN

* * *

[103] DIRECT EXAMINATION

BY MR. LANE:

* * *

[104] Q. Officer Queen, as a part of your duties, have you been in this area at night-time? A. Yes, I have.

Q. Now, from your experience at night-time, I am going to ask you whether or not the light, which you have just referred to, whether the beam of that light extends to Anacostia Drive and Good Hope Road?

MR. PHELPS: Objection.

THE COURT: He can answer if he knows.

THE WITNESS: No.

BY MR. LANE:

Q. Now, to the right—and I will point as I face the diagram—to the right, is there any light fixture within [105] the general area of Anacostia Drive? A. To the right, he nearest light fixture is about 450 feet away.

Q. Now, with respect to that particular light, does the beam of that light extend to the Good Hope Road and Anacostia Drive intersection? A. No, it doesn't.

Q. Now, I am going to ask you now about Good Hope Road. From the point of where you have the stop sign, is there a light up Good Hope Road? A. Yes, there is.

Q. How far is that? A. There is a light up Good Hope Road to about 250 to 275 feet away.

Q. Now, to what point, if any, can you state, from your experience, that the beam of that light extends? A. The beam of that light would extend to about 50 feet from the stop sign.

Q. That means 50 feet— A. Back from the stop sign.

Q. On Good Hope Road? A. On Good Hope Road.

* * *

[106] PAUL FREDERICK HILLERY

* * *

DIRECT EXAMINATION

BY MR. LANE:

* * *

[108] Q. Now, I am going to ask you, Mr. Hillery, to tell us, first of all, as you approached Anacostia Drive, what speed were you driving? A. 25 to 30 miles an hour.

Q. Now, with respect to the particular area as you approached it, can you tell us about the lighting as you approached that particular area? A. Well, it was dark. Of course, it was quite late at night and it was nothing to indicate that there was a turn—that I had to turn to the right or I had to turn to the left. There was no sign up there that says that is the only way you can turn, to the right or left. And it was dark. I did not see the stop sign.

Q. At that time, sir, did you traverse Anacostia Drive? In other words, did you cross Anacostia Drive? A. Yes, sir, I did.

Q. And come upon the grass area? [109] A. Yes, I did. But I didn't realize I was on grass until I was in the water, because I tried to—I tried to apply my brakes when I realized that the water was ahead of me. Even before I knew it, I was in.

Q. Could you describe the manner in which the car, as you say, you had applied the brakes, how it went across the sea wall? A. Well, it almost exactly like that (indicating). It shows a straight line. Of course, it was a cold night and it was a frosty night. I think it was—the next morning it was 18 degrees above zero and

there was frost on the grass. Apparently, the wheels just didn't have traction, or something, until it got to the sea wall itself.

Then, as the pictures show, the tire marks show, there was great brakes applied, but by that time it was too late.

* * *

[136] MR. LANE: * * * There is one matter in the charge that I imagine that Your Honor would touch on in the general charge, that I do wish to bring it to your attention.

In the civil instructions, No. 61, I think that it is appropriate in this case that a charge be given as follows:

[137] No inference of negligence whatever arises from the mere happening of the accident in this case.

You are not to infer from the mere fact that an accident happened that this defendant was negligent.

On he contrary, the legal presumption is that reasonable care was exercised by him.

The burden of proof is upon the Government, charging negligence, to overcome this presumption of due care by proof beyond a reasonable doubt and to prove that the negligence, is established, was the proximate cause of the accident.

THE COURT: Mr. Phelps;

MR. PHELPS: Your Honor, I have not yet been favored with the opportunity to see that instruction. Would you indulge me just a moment?

THE COURT: Yes.

MR. LANE: Beginning here, No. 61.

MR. PHELPS: Of course, Your Honor, this instruction is framed for use when there is a collision between two automobiles, or a collison, rather than the situation that we have here.

I would agree that the fact of an accident alone does not raise an inference of negligence.

However, the jury can look at the circumstances under which the accident occurred to make any inferences they [138] wish to

make, whether there is negligence or not negligence.

As it is presently drawn, the fact of the accident, the way it is framed, seems to create a presumption that the man was not negligent, which is topsy-turvy reasoning.

THE COURT: We are not talking about civil negligence.

MR. PHELPS: That is right, Your Honor.

THE COURT: In order for the jury to find manslaughter, they have to find gross and wanton disregard for the safety of the passenger in the car that wound up in the River.

As far as the negligent homicide, they have to find recklessness. We do not get involved in any civil negligence standard. This is why I make the distinction in the proposed charge.

* * *

[164] (AT THE BENCH)

MR. LANE: My only objection is based on what I said before about that proffered instruction which is already in the record.

THE COURT: Very well.

* * *

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to suppress all evidence which was obtained from him following an automobile accident. Specifically, defendant wishes to suppress all oral and written statements that he made to the police, and in addition the results of an urinalysis which was made at D.C. General Hospital during the early morning hours following the accident.

The facts, briefly stated, are as follows:

Defendant was the driver of an automobile which was involved in an accident on Anacostia Drive and Good Hope Road, S.E., in the District of Columbia, a little after midnight on November 19, 1967. The automobile ran into the Anacostia River. Defendant managed to get out of the car and swim to shore, but a woman who was in the car with defendant remained in the car and drowned (although this was not known as a fact by the defendant or the police until her body was recovered the following morning). The defendant hailed a passing motorist and was taken to the Eleventh Precinct. Although there is conflict in the testimony as to the sequence of events which followed, it is apparent that the defendant was taken to the scene of the accident and also to the D.C. General Hospital He was taken back to the police station and given a ticket for failure to give full time and attention to his driving, and was released about 10 o'clock on the morning of November 29th. A Grand Jury later returned an indictment for manslaughter. This motion to suppress was heard and taken under advisement, and a copy of the transcript was ordered to assist the Court in ruling on the motion.

While the defendant was at the Eleventh Precinct, he asked a number of times if he should be represented by counsel. According to defendant he was told that it was not necessary to have coun-

sel. The police officers knew that the defendant had been drinking, and they doubted the defendant's story that a woman was with him and was still in the car. By the defendant's own statement, the police did not know that a woman was in the car until 6:30 in the morning. Until that time, the police were merely investigating an accident.

The right to counsel accrues when an individual is arrested and taken into custody where the police have probable cause to believe that a felony has been committed, and that the defendant was the one who committed it. The facts of this case, however, disclose only an investigation of an automobile accident. The police did not feel that defendant was required to have counsel since they did not know that a felony had been committed. Their actions were entirely reasonable under the circumstances. The police informed defendant that he was not required to submit to the urinalysis. Defendant voluntarily agreed to take the test.

Accordingly, for the reasons stated above, it is, by the Court, this 9th day of May, 1969,

ORDERED, that the defendant's motion to suppress be, and the same is, hereby DENIED.

/s/ Leonard P. Walsh, Judge.

Copies to:

U. S. Attorney's Office

Dennis Lane, Esquire
Attorney for Defendant

[illegible]

[illegible]

[illegible]

No. 8428

[illegible]

United States of America, Appellee

v.

Paul E. Priest, Appellant

[illegible]

Appeal from the United States District Court
for the District of Columbia

[illegible]

[illegible]

Edward A. Tamm,
United States Attorney.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Cr. No. 22038.

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Did the two District Judges correctly rule that appellant was not under arrest at the time of the accident investigation and that therefore there was no *Miranda* violation?

II. Did appellant voluntarily submit to the urine test?

III. Was the chain of custody of the urine sample unbroken?

IV. Were the results of the urine test properly admitted at trial despite the loss of the sample prior to trial?

V. Did the court properly refuse to give appellant's requested civil instruction.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,206

UNITED STATES OF AMERICA, APPELLEE

v.

PAUL F. HILLERY, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for manslaughter on March 4, 1968. On May 9, 1969, the Honorable Leonard P. Walsh denied appellant's pretrial motion to suppress. On December 2, 1969, trial began before the Honorable Aubrey E. Robinson, Jr. The jury found appellant guilty of the lesser included offense of negligent homicide on December 3, 1969.[1] Appellant was fined $1,000 and placed on probation for two years. This appeal followed.

[1] In violation of 40 D.C. Code § 609.

On Tuesday night, November 28, 1967, Joseph Francis Gatesman drove his car to the intersection of Good Hope Road and Anacostia Drive, S.E., where he saw a man standing in the middle of the road waiving his arms for help. Mr. Gatesman answered the unknown solicitor's call. The stranger asked Mr. Gatesman to take him to the police, stating, "My car is in the river. I just drove my car into the river and there are people in it. Get me a policeman." The stranger was "soaking wet"; he staggered in his movements and slurred his speech. Mr. Gatesman drove the wet stranger to the Eleventh Precinct and watched him disappear into the precinct building from the cold, windy night (Tr. 8-16).

Sergeant Denny R. Sorah of the United States Park Police responded to the scene at Good Hope Road and Anacostia Drive. He witnessed Private Thomas Abbot of the Park Police talking to appellant.[2] Two scuba divers were on the scene diving for the car and its occupants. On a grass area were tire marks, one on either side of a broken bush, which led to the sea wall and the dark Anacostia River below.[3] A car was pulled from the river with the body of the deceased, Catherine L. Petingo, positioned in the rear seat (Tr. 16-53).

Counsel entered into stipulations that the car pulled from the river was owned by appellant and that the body

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[2] Trial counsel for appellant, who also represents him on appeal, renewed his motion to suppress, and the trial judge denied it after advising counsel that he concurred in the earlier memorandum of Judge Walsh which denied the pre-trial motion. Counsel then raised the matter of collateral estoppel, and the trial court noted that counsel had presented no authority to support his position (Tr. 32-34). Reference to the trial transcript shall be "Tr." and reference to the pre-trial hearing shall be "Tr. H.".

[3] Charles A. Queen of the United States Park Police testified that he assisted in the taking of photographs on the scene as well as measuring the relevant distances. It was 90 feet from the sea wall (where the car entered the river) to the north edge of Anacostia Drive. There was a bush between the river and street which had been knocked down. The divers found the car 50 feet out in the Anacostia River from the sea wall (Tr. 58-62).

found in the car was that of Catherine L. Petingo, who died as a result of drowning (Tr. 70).

Appellant was taken to the District of Columbia General Hospital (Tr. 74). Sergeant Sorah came to the hospital and advised appellant that if a body were found in the submerged vehicle, then appellant could be subject to a traffic charge and that he was therefore entitled to counsel. Appellant was then fully advised of his rights, and he acknowledged his understanding of those rights. The sergeant asked appellant if Officer Thomas Abbot could obtain a urine specimen, and appellant said, "[I] have been drinking." Officer Abbot advised appellant that if he consented to the urine sample, then the analysis could be used against him and that appellant did not have to consent to the giving of the sample.[4] Appellant then gave Officer Abbot a urine sample. The police officers next told appellant that he was not being charged at that time and that he was free to go home (Tr. 75-84).

John A. Vignau of the District of Columbia Health Department, Bureau of Laboratories, Chemistry Division, examined the urine given by appellant and found .29% of alcohol present (Tr. 89-94).

Appellant testified that as he approached Anacostia Drive on the fatal night his speed was 25 to 30 miles per hour. The street was dark, and nothing indicated that a turn lay ahead. Appellant said his car was on a grassy area before he knew what happened and that when he applied his brakes it was too late to avoid the water which waited below. Appellant escaped; his female companion did not. Appellant said that he stood in the

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[4] Officer Abbot testified on June 7, 1968, at the hearing on the motion to suppress before Judge Walsh. Officer Abbot was hospitalized at the time of appellant's trial, and therefore counsel stipulated that if Abbot could testify, he would testify as he had at the hearing. At trial the prosecutor, Mr. Phelps, read the questions from the hearing transcript and another Assistant United States Attorney, Mr. Lyons, read Abbot's answers in the jury's presence. At the completion of the reading both counsel agreed that the transcript reading was correct (Tr. 72-73, 86).

middle of the road, flagged down Mr. Gatesman and told him to take him to the police because he had driven his car into the river and that there was still a woman in the car (Tr. 107-112). Appellant said that he drank four beers in the eight hours prior to his driving into the river (Tr. 113, 115).

Dr. Oscar B. Hunter, Jr., of Hunter Laboratory, testified as a pathologist that "at .20% by weight of alcohol in urine all people are under the influence." He said such a condition causes delay in reflexes and inability to coordinate (Tr. 140, 144). Dr. Hunter also testified that a person who had .29% alcohol content in his urine would have to have consumed at least eight beers in the preceding eight hours in order to register such a high alcoholic content (Tr. 139-141).

ARGUMENT

I. The two District Judges correctly ruled that appellant was not under arrest at the time of the accident investigation and that therefore there was no *Miranda* violation.

(Tr. 32-34, 70; Tr. H. 3-8, 13-14)

By means of a pre-trial motion, appellant sought to suppress all statements made by him to the police after the automobile accident on November 28, 1967.[6] The

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[6] We are unable to find any specific statement with which appellant is particularly concerned as assertedly violating his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In scrutinizing the record we are of the opinion that appellant best represented his grievance with the police procedure in his preliminary statement to the pre-trial judge when he sought to suppress "all the evidence which arose as the result of the manner in which [appellant] was held" (Tr. H. 5). Therefore, for the convenience of the Court we set out here the relevant portions of defense counsel's statement to the court:

> The defendant went into the 12th Precinct to report the accident that he was involved in, and of course reported the accident and made certain statements at that time particular time. He was not given an opportunity to have counsel. The

judge that held the hearing on the motion to suppress denied appellant's motion in a memorandum and order dated May 9, 1969.[6] We urge this Court to uphold that ruling.

Appellant was taken to the Eleventh Precinct by Mr. Gatesmen after having told Mr. Gatesmen of the accident. The testimony at the pre-trial hearing reflects that

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police at that time, I believe, not through any malice or anything of that sort, took a very light view of that particular case. And we are prepared to show that he made inquiry about counsel himself and the police told him he didn't have to have counsel. [H]e was sent to the hospital and he was apparently in shock when he came into the police station. There was a question of injury so he was taken to the hospital by the officer. So, he was at the precinct quite a number of hours in which he made statements concerning the incident involved. About 10:00 o'clock in the morning he was finally released at the station house. He was released and he was given a ticket for failure to give full time and attention. And in this motion, I am going to introduce this ticket in evidence. He, of course, was not taken before any United States Commissioner at any time during this period of hours. Despite the fact that it might have been treated as a simple traffic matter, because of what has resulted in the indictment by the grand jury that the necessary rights and procedure constitutionally which were established, should have been followed by the officers, and it was not. Because of that, *we move to suppress all of the evidence which arose or was obtained by the officers as a result of the manner in which this man was held and questioned and evidence obtained from him.* There is a urinalysis which was taken which we believe clearly, legally, logically, should be suppressed as evidence. We believe that any statement, written or oral, made by this man at any time should be suppressed. He was denied his rights under the Sixth Amendment clearly. As far as the urinalysis is concerned, the man is going to state that this was given, not at the police station, but at the hospital. He believed that was a manner of hospital routine, and if he had had the opportunity to have counsel he would not have given such a specimen of his urine. If he had been advised of his rights to refuse to give such a test; all of this hinges upon the fact that this man was in a serious situation. He did not have counsel, although he wanted counsel, his wife wanted counsel, but he was not given the opportunity to have counsel. (Tr. H. 3-6) (emphasis added).

[6] See the court's memorandum and order in the appendix, *infra*, pp. 13-14.

appellant was not too sure about anything that happened after he arrived at the precinct at approximately 12:30 p.m. and promptly reported the events of the night to the police (Tr. H. 8). Appellant testified that while at the police station he was not advised of his right to counsel; however, this Court as recently as April of this year held that a spontaneous, volunteered statement not a product of custodial interrogation is not in violation of *Miranda*. *Bosley* v. *United States*, D.C. Cir. No. 21,513, decided April 9, 1970, slip op. at 7-8. Clearly appellant, who spontaneously described the events to Mr. Gatesmen, continued to be in the same spontaneous state of mind five minutes later when he alighted from Mr. Gatesmen's car and immediately advised the otherwise ignorant police, voluntarily, of his earlier inculpatory actions (Tr. H. 7-8, 13-14).

Appellant further opposed the introduction of any statements made at the scene and the hospital as well as testimony resulting from the urinanalysis made on the specimen appellant gave at the hospital. Appellant's entire argument here is also based on *Miranda* and the right to counsel; however, there was clearly never any "in-custody interrogation" of appellant at the precinct, at the scene of the Anacostia River or at the hospital. *Miranda* itself proclaims the admissibility of voluntary, spontaneous utterances such as those made by appellant. 384 U.S. at 478; see *Bosley* v. *United States*, *supra*. As for the urinalysis, *Miranda* does not apply. See argument II, *infra*.

Finally, we note that the pre-trial judge went so far as to prepare a memorandum and order which was based on the extensive testimony he heard and explained the facts as he understood them to be. The trial judge, when confronted with the issue, concurred in the earlier ruling of his fellow judge (Tr. 32-34).[7] Since both judges based

[7] We also note that counsel for appellant, who also represented him at trial, made his "estoppel" motion before the trial court. The court observed that counsel had submitted no authority in support of his argument and denied the motion (Tr. 32-34). We are again faced with appellant's estoppel argument, and again he

their decisions on extensive testimony and since those decisions have substantial evidentiary support, they should not now be disturbed. *United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969.

II. Appellant voluntarily submitted to the urine test; the chain of custody of the sample was unbroken; and the results of the test were properly admitted at trial despite the loss of the sample prior to trial.

(Tr. 32-34, 76-78, 91-94; Tr. H 42)

A motor vehicle operator has the right to refuse to take a urine sobriety test. *Stuart* v. *District of Columbia*, 157 A.2d 294 (D.C. Mun. Ct. App. 1960). However, a vehicle operator may volunteer to take the urine test, and, we submit, that is precisely what appellant did in the instant case. The judge at the pre-trial hearing listened to the testimony and concluded that appellant had voluntarily consented to the test.[3] The trial judge concurred in the written opinion of the motions judge and denied appellant's renewed motion to suppress (Tr. 32-34).

The testimony clearly shows that Sergeant Sorah asked appellant if the police could obtain a urine specimen from him while he was still at the hospital. Officer Abbot then told appellant that if he consented to the urine test, then the analysis could be used against him. *Cf. Schmerber* v. *California*, 384 U.S. 757 (1966). Officer Abbot advised appellant that he *did not* have to take the test. The officer was of the opinion that appellant was not in shock but was conscious and fully aware of what was happening about him. Appellant volunteered to give a urine sample, went into the rest room with Officer Abbot

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presents no authority to support his theory. We find it difficult to grasp appellant's contention with respect to this claimed estoppel, particularly in the absence of clarifying authority. On this record we see no basis for such a claim.

[3] See the court's Memorandum and Order in the Appendix, *infra*, pp. 13-14.

and produced the urine (Tr. 76-78). Certainly this evidence supports both judges' findings of voluntariness, and accordingly those findings should not be disturbed. *Cf. United States* v. *McNeil, supra.*[9]

Appellant misreads *Novak*[10] and *Wheeler*[11] when he argues that no testimony based on the analysis of appellant's urine can be introduced at trial when the specimen is not produced in court. Both *Novak* and *Wheeler* relate to the Government's burden of proof of chain of custody of the urine sample and not to the production of demonstrable evidence as a prerequisite to oral testimony on the urinalysis. Appellant has cited no authority, and we know of none, which forbids testimony by an expert witness about his findings simply because the sample from which his observations were made has been misplaced, inadvertently destroyed, or is no longer available[12] (Tr. 91).

Additionally, there was sufficient proof of the chain of custody of the urine specimen in the instant case. By stipulation it was agreed that counsel would accept Officer Abbot's testimony as given at the pre-trial hearing (see note 4, *supra*). Abbot's testimony established that

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[9] Appellant appears to rely on *Miranda, supra* note 5, to support his argument as to the voluntariness of appellant's taking the urine test. *Schmerber* v. *California, supra,* disposes of that argument. Appellant further speculates as to whether "under the circumstances, it can be said that he voluntarily gave . . . a urine specimen" (see appellant's brief at 7). Surely we should not speculate outside the fact-filled record which supports discretionary findings of voluntariness by two different judges.

[10] *Novak* v. *District of Columbia,* 82 U.S. App. D.C. 95, 160 F.2d 588 (1947).

[11] *Wheeler* v. *United States,* 93 U.S. App. D.C. 159, 211 F.2d 19 (1953).

[12] It has long been recognized that the testimony by a witness of what he saw or observed is primary evidence. A policeman may testify as a matter of description that he saw a bottle with a label marked "whisky" without producing the bottle. *Commonwealth* v. *Pallock,* 174 *Pa. Super.* 621, 101 A.2d 140 (1953). Similarly, stolen goods may be described without producing an inventory slip describing them. 2 WHARTON, CRIMINAL EVIDENCE § 607, at 501-502 (12th ed. 1955).

he was with appellant when the sample was given, sealed the specimen and delivered it to police headquarters, where it was subsequently tested in the laboratory (Tr. H 42). Mr. Vignau, of the District of Columbia Health Department, testified that he received the specimen at 8:15 a.m. on November 29, 1967, and made his analysis (Tr. 92-94).[13] The Government did not seek to introduce the actual specimen of urine (Tr. 91). Clearly the chain of custody burden was met here, where the record reflects that Officer Abbot processed the specimen to the laboratory and Mr. Vignau received it there and analyzed it. See *Gass* v. *United States*, 135 U.S. App. D.C. 11, 416 F.2d 767 (1969).

III. The court properly refused to give appellant's requested civil instruction.

(Tr. 70, 136-138, 154, 159-163)

At trial appellant requested an instruction pursuant to civil instruction no. 61[14] and the court ruled that the proffered instruction would tend to confuse rather than clarify the law in the minds of the jury (Tr. 136-138). The court went on to instruct the jury with the standard reasonable doubt instruction (Tr. 154) and defined man-

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[13] At trial appellant's counsel moved to strike Mr. Vignau's testimony because there had been no introduction of the specimen and therefore there was no proof that the specimen described by Mr. Vignau was the same specimen given by appellant. The court denied appellant's request with the remark that "[i]t does not make any difference." We submit that the trial court's evaluation of appellant's argument was accurate.

[14] The instruction appellant requested was as follows:

> No inference of negligence whatever arises from the mere happening of the accident in this case. You are not to infer from the mere fact that an accident happened that this defendant was negligent. On the contrary, the legal presumption is that reasonable care was exercised by him. The burden of proof is upon the Government, charging negligence, to overcome this presumption of due care by proof beyond a reasonable doubt, and to prove that the negligence, if established, was the proximate cause of the accident (Tr. 137).

slaughter and negligent homicide (Tr. 159-163). Appellant has cited no authority and fails to explain why the "hypothesis of his case," which is allegedly couched in his proffered instruction, should have gone to the jury (see appellant's brief at 10).

The court properly ruled that the requested instruction applied to civil cases only. In giving its instruction on negligent homicide, the court gave the statutory definition of the offense. Next the court advised the jury that they must find that the deceased died as a result of injuries from the accident.[15] The court again emphasized that in order for appellant to be guilty he must have operated the car at an immoderate rate of speed or in a careless, reckless, or negligent manner. Immediately after the above instruction the court defined negligence for the benefit of the jury as

> the doing of some act which a reasonably prudent person would not do, or the failure to do an act which a reasonably prudent person would do when prompted by considerations which ordinarily regulate the conduct of human affairs (Tr. 161-163).

Nowhere in the charge did the court use the expression "proximate cause" (which appellant included in his proffered instruction), but such an omission was not misleading and would not have clarified the jury's thoughts. *Prezzi* v. *United States*, 62 A.2d 196, 198 (D.C. Mun. Ct. App., 1948). Clearly, the court was fair in its considerations, proper in its giving of the instructions and free from any degree of cognizable error.

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[15] This was obviously no burden on the jury, since appellant stipulated to this vital element (Tr. 70).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
KENNETH MICHAEL ROBINSON,
Assistant United States Attorneys.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 210-68

UNITED STATES OF AMERICA

v.

PAUL F. HILLARY

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to suppress all evidence which was obtained from him following an automobile accident. Specifically, defendant wishes to suppress all oral and written statements that he made to the police, and in addition the results of an urinalysis which was made at D. C. General Hospital during the early morning hours following the accident.

The facts, briefly stated, are as follows: Defendant was the driver of an automobile which was involved in an accident on Anacostia Drive and Good Hope Road, S. E., in the District of Columbia, a little after midnight on November 29, 1967. The automobile ran into the Anacostia River. Defendant managed to get out of the car and swim to shore, but a woman who was in the car with the defendant remained in the car and drowned (although this was not known as a fact by the defendant or the police until her body was recovered the following morning). The defendant hailed a passing motorist and was taken to the Eleventh Precinct. Although there is conflict in the testimony as to the sequence of events which followed, it is apparent that the defendant was taken to the scene of the accident and also to the D. C. General Hospital. He was taken back to the police station and given a ticket for failure to give full time and attention to his driving, and was released about 10 o'clock on the morning of November 29th. A Grand Jury later returned an indictment for manslaughter. This motion

to suppress was heard and taken under advisement, and a copy of the transcript was ordered to assist the Court in ruling on the motion.

While the defendant was at the Eleventh Precinct, he asked a number of times if he should be represented by counsel. According to defendant he was told that it was not necessary to have counsel. The police officers knew that the defendant had been drinking, and they doubted the defendant's story that a woman was with him and was still in the car. By the defendant's own statement, the police did not know that a woman was in the car until 6:30 in the morning. Until that time, the police were merely investigating an accident.

The right to counsel accrues when an individual is arrested and taken into custody where the police have probable cause to believe that a felony has been committed, and that the defendant was the one who committed it. The facts of this case, however, disclose only an investigation of an automobile accident. The police did not feel that defendant was required to have counsel since they did not know that a felony had been committed. Their actions were entirely reasonable under the circumstances. The police informed defendant that he was not required to submit to the urinalysis. Defendant voluntarily agreed to take the test.

Accordingly, for the reasons stated above, it is, by the Court, this 9th day of May, 1969,

ORDERED, that the defendant's motion to suppress be, and the same is, hereby DENIED.

/s/ Leonard P. Walsh
LEONARD P. WALSH
Judge

Copies to:

U. S. Attorney's Office
Dennis Lane, Esquire
Attorney for Defendant

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